WONG KON THAT & ORS

v.

KETUA KOMANDAN PUSAT SERENTI KARANGAN, KULIM & ANOR

HIGH COURT MALAYA, TAIPING
ZULKEFLI MAKINUDIN J
[CRIMINAL APPLICATION NO: 44-3-98]
20 APRIL 1998

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Order of residence - Detention of drug dependant at rehabilitation centre ordered by magistrate under s. 6(1) Drug Dependants (Treatment and Rehabilitation) Act 1983 - Whether such order is made in the course of a judicial proceeding - Whether detention unlawful - Challenge as to validity of order - Whether applicant should have applied by way of certiorari - Whether order remains valid until quashed by court of competent jurisdiction - Whether writ of habeas corpus lies against order made by court of competent jurisdiction*

ADMINISTRATIVE LAW: *Remedies - Habeas corpus - Order of residence - Detention of drug dependant at rehabilitation centre ordered by magistrate under s. 6(1) Drug Dependants (Treatment and Rehabilitation) Act 1983 - Distinction between application for writ of habeas corpus and application for judicial review by way of writ of habeas corpus made by detainee under preventive laws*

The applicants were held to be drug dependants and were ordered by a magistrate to be admitted to a rehabilitation centre pursuant to s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). This was the applicants' application for a writ of *habeas corpus* to be released forthwith.

The respondents raised a preliminary issue as to whether the applicants adopted the right procedure in seeking an order for a writ of *habeas corpus* instead of an order of *certiorari*. The respondents contended that the applicants should have applied for an order of *certiorari* and not an order for a writ of *habeas corpus* because the order detaining the applicants at the rehabilitation centre was a lawful order made by a magistrate in accordance with the powers vested in him pursuant to s. 6 of the Act. Therefore, the respondents asserted that any person aggrieved with the issuance of the said order should apply for it to be quashed by way of an order of *certiorari* as provided under O. 53 of the Rules of the High Court 1980 since the order of a writ of *habeas corpus* could not quash the said order made by the magistrate. It was further

contended by the respondents that since the applicants were challenging the decision making process of the magistrate, a writ of *habeas corpus* was not the order that could be made available to the applicants to challenge the validity of the said order of the magistrate detaining the applicants at the rehabilitation centre.

Held:

[1] The order made by the magistrate under s. 6 of the Act was an order made in the course of a judicial proceeding. A writ of *habeas corpus* does not lie against an order made by a court of competent jurisdiction.

[2] The applicants were not challenging the merits of the decision of the magistrate in issuing the said order but the procedure adopted by the magistrate in making his decision to issue the said order. What had to be determined by this court in this application was the legality of the order and not the merits of the order made by the magistrate.

[3] The first respondent, in detaining the applicants, had acted upon a lawful order issued by the magistrate under s. 6 of the Act and, under s. 19 of the Act the applicants shall thereafter be deemed to be in lawful custody. Thus, the applicants were not being unlawfully detained.

[4] Since what was being challenged was not the act of detention of the applicants but the order of the magistrate giving the authority to detain the applicants, the action that had to be taken was to apply to quash the said order because even though the said order was said to have been made without complying with certain requirements of the law, it nevertheless still remained a valid order until it was quashed by the High Court as a court of competent jurisdiction.

[5] The magistrate had made the order to detain the applicants in a judicial proceeding. The applicants, being the aggrieved persons, should have applied for an order of *certiorari* to quash that order failing which the order of the magistrate would stand.

[6] The present application for a writ of *habeas corpus* could be distinguished from the application for judicial review by way of a writ of *habeas corpus* made by a detainee under preventive laws such as the Internal Security Act 1960 or the Public Order and Prevention of Crime Ordinance 1969. Under such preventive laws, a detention order is issued by the executive body in the name of the Minister of Home Affairs or his deputy exercising his executive function and powers. When an application for judicial review is made and it results in a writ of *habeas corpus* being issued, the effect

on the executive order is that the detention order is set aside or quashed. Whereas, in the present application the detention order issued by the magistrate must be treated as an order made in a judicial proceeding which shall stand until it was quashed by another order of a superior court of competent jurisdiction. This could be done only by way of an order of *certiorari* and not by way of a writ of *habeas corpus*.

[Preliminary objection allowed; application dismissed.]

Cases referred to:
Ang Gin Lee v. PP [1991] 1 MLJ 498 ***(refd)***
Hotel Equatorial (M) Sdn Bhd v. National Union of Hotel Bar & Restaurant Workers [1984] 2 CLJ 6 ***(aff)***
Inspector General of Police & Ors v. Teh Guan Teik (unreported) ***(foll)***
Re Makhanlall & Co Ltd [1969] 1 MLJ 36 ***(refd)***
Re Rashidi Mohamed [1988] 2 MLJ 193 ***(cit)***
The King v. The Commanding Officer of Morn Hill Camp, Winchester [1917] 1 KB 176 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 307(1), 365
Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 6(1)(a), 19
Federal Constitution, art. 5(2)
Rules of the High Court 1980, O. 53

Other source referred to:
Administrative Law, Wade & Forsyth, 7th edn

For the applicants - Naran Singh (Palaniappan Ramasamy; M/s Palani with him); M/s Naran Singh & Co
For the respondents - Mohamad Abazafree Mohd

Reported by S Dharmendran

JUDGMENT

Zulkefli Makinudin J:

The applicant Wang Kon That had been ordered by the learned magistrate of the magistrate court of George Town, Pulau Pinang to be detained at a rehabilitation centre at Karangan, Kulim in the State of Kedah for the purpose of undergoing treatment and rehabilitation for a period of two years under the provision of s. 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ("the Act"). As a result of the said order made by the learned magistrate the applicant filed this application for a writ of *habeas corpus* to be issued against the named respondents and for the applicant to be released forthwith.

At the outset of the hearing of this application Encik Abazafree, the learned Federal Counsel for the respondents informed the court that he would like to raise a preliminary issue as to whether the applicant adopted the right procedure when seeking an order for a writ of *habeas corpus* instead of an order of *certiorari.* It is contended that the applicant should have applied for an order of *certiorari* to quash the order of the magistrate rather than file a writ of *habeas corpus.* On the day fixed for the hearing of this application there are seven other similar applications to be heard on the same day involving seven other applicants who had been ordered by the respective magistrates of the various magistrates court in Penang, Perak and Kedah under separate orders to be detained at the various rehabilitation centres in the state of Perak and Kedah for the purpose of undergoing treatment and rehabilitation for a period of two years under the provision of s. 6(1)(a) of the Act. All the said seven applicants had also filed their applications for a writ of *habeas corpus* to be issued against the named respondents and for the applicants to be released forthwith. It was agreed then by all the counsels acting for the seven other applicants that in the event this court allows the preliminary objection heard under this criminal application No. 44-3-98 by the applicant, Wong Kon That the decision given by this court shall be binding on all the seven other applicants in Criminal Application No. 44-4-98; 44-5-98; 44-7-98; 44-8-98; 44-13-98; 44-14-98 and 44-15-98 respectively.

It is the contention of the learned Federal Counsel that in the present application the applicant should have applied for an order of *certiorari* and not an order for a writ of *habeas corpus.* This is because the learned magistrate when making the order for the applicant to be detained at the rehabilitation centre was exercising his powers under a judicial proceeding as provided under s. 6 of the Act and the said order was only made after the learned magistrate had duly considered the report of the medical officer, the report of the rehabilitation officer and after having given the applicant his rights to make representation. In short it is contended on behalf of the respondents that the order detaining the applicant at the rehabilitation centre was based on a lawful order made by the learned magistrate in accordance with the powers vested in him under a statute. In this regard the learned Federal Counsel submitted that any person aggrieved or dissatisfied with the issuance of the said order should apply for it to be quashed by way of an order of *certiorari* as provided under O. 53 of the Rules of the High Court 1980. The order of a writ of *habeas corpus* if issued cannot quash the said order made by the learned magistrate.

It was further submitted for the respondents that what actually is being challenged by the applicant through the supporting affidavit filed are matters relating to the decision making process of the magistrate. In the circumstances it is contended that a writ of *habeas corpus* is not the order that could be made available to the applicant to challenge the validity of the order of the magistrate detaining the applicant at the said rehabilitation centre. The English case of *The King v. The Commanding Officer of Morn Hill Camp, Winchester* [1917] 1 KB 176 was cited as the authority for the proposition wherein Darling J at p. 180 *inter alia* had this to say:

> If the magistrate had had no jurisdiction in the matter this writ might have been an available remedy but such writs are not to be obtained by confusing jurisdiction with merits. The writ of *habeas corpus* does not lie whenever the court decides wrongly. It lies where a person is detained without justification.

Encik Naran Singh, the learned counsel for the applicant submitted that the argument put forth by the learned Federal Counsel for the respondents was not supported by any locally decided case. As far as the application for a writ of *habeas corpus* is concerned there is no specific Act or law governing such application. The provision under O. 54 Rules of the High Court 1980 previously governing the procedure pertaining to *habeas corpus* application has been repealed by the Rules of the High Court (Amendment) 1993 (PU((A) 192/93). The only provision found in respect of *habeas corpus* application is in Chapter xxxvi of the Criminal Procedure Code ("CPC") whereby under the provision of s. 365 of the CPC the High Court is vested with the powers to make certain orders resulting in the release of persons from any alleged incidence of unlawful detention. It is also submitted for the applicant that the fact that the applicant had been placed in lawful custody by virtue of the provision of s. 19 of the Act is not relevant and applicable to this case. It is contended for the applicant that the provision of s. 19 of the Act will only come into play after the magistrate had fully complied with the requirements of s. 6 of the Act. The applicant is in fact now challenging the decision making process of the magistrate in issuing the said order under s. 6 of the Act.

The learned counsel for the applicant also referred to me a number of cases earlier decided by our courts whereby the said order made by the magistrate under s. 6 of the Act had been challenged and the courts had duly entertained such application resulting in a writ of *habeas corpus* being issued (see the case of *Re Rashidi bin Mohamed* [1988] 2 MLJ 193). It was further submitted that in the case of *Ang Gin Lee v. PP* [1991] 1 MLJ 498 when the then Supreme Court was deliberating on the scope and legislating scheme of s. 6 of the Act the issue of the propriety of the issuance of a writ of *habeas corpus* was never an issue discussed at all.

Having heard the submission of the learned Federal Counsel for the respondents and the learned counsel for the applicant and having studied the relevant case authorities cited by both parties I allowed the said preliminary objection raised on behalf of the respondents. It is my view that the writ of *habeas corpus* is not the appropriate remedy to be applied for in this case and that the applicant should have applied for an order of *certiorari*. It is my finding that the order made by the learned magistrate under s. 6 of the Act is an order made in the course of a judicial proceeding and therefore a writ of *habeas corpus* does not lie against an order made by court of competent jurisdiction. As had already been dealt with by the Supreme Court in the case of *Ang Gin Lee v. PP (supra)* the order given by the magistrate under s. 6 of the Act is a final order and not appealable to the High Court. It was also held in that case that the order made by the magistrate under s. 6 of the Act is not an order pronounced by a magistrate court in a criminal case or matter for the purpose of appeal under s. 307(1) of the CPC.

The real issue therefore to be considered in this application is on what aspect of the order made under s. 6 of the Act is the applicant actually challenging. Looking at the supporting affidavit of the applicant I find that the applicant is not challenging the merits of the decision of the magistrate in issuing the said order but more on the procedure adopted by the magistrate in making his decision to issue the said order. In this regard I would like to refer to the case of *Hotel Equatorial (M) Sdn. Bhd. v. National Union of Hotel Bar & Restaurant Workers* [1984] 1 MLJ 363, wherein his Lordship George Seah FJ in delivering the judgment of the Federal Court at p. 371 had this to say:

> In the exercise of its inherent supervisory jurisdiction over inferior tribunals of limited jurisdiction the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed has no jurisdiction to consider the merits of the case; its only function is to consider whether the inferior tribunals has performed its duties according to law. A clear distinction must be maintained between want of jurisdiction and the manner of its exercise ...

Taking into consideration the proposition of the law as propounded by the Federal Court in the above stated case, I am of the view that what has to be determined by this court in this application is the legality of the order and not the merits of the order made by the learned magistrate. There are a number of remedies available that can be applied for by any person aggrieved or dissatisfied with any order made by an inferior tribunal given the statutory powers to make such an order. In the context of the present case the question is whether the applicant should seek an order for a writ of *habeas corpus* or an order of *certiorari* to quash the order of the magistrate. As regards the

propriety of a writ of *habeas corpus* to be issued in this application it would be appropriate to make reference to the provision of art. 5(2) of the Federal Constitution which states as follows:

> Where a complaint is made to a High Court or any judge thereof that a person is being **unlawfully detained** the court shall enquire into the complaint and unless satisfied that the detention is lawful shall order him to be produced before the court and release him. [the bold is mine]

I am of the view that since this application for a writ of *habeas corpus* by the applicant is also directed against the chief commandant of the rehabilitation centre, the first respondent who is the person in actual physical custody of the applicant, there arises therefore the question of whether the applicant is being unlawfully detained. To my mind the answer is in the negative. This is because the first respondent had acted in detaining the applicant based upon a lawful order issued by the magistrate under s. 6 of the Act and under s. 19 of the Act the applicant shall thereafter be deemed to be in lawful custody. As can be seen what is being challenged is not the act of the detention of the applicant but the order of the magistrate giving the authority to detain the applicant. In the circumstances the action that has to be taken is to apply to quash the said order because even though the said order is said to have been made without complying with certain requirements of the law nevertheless it still remains a valid order until it is quashed by the High Court as a court of competent jurisdiction.

In the unreported decision of the Court of Appeal's case in Civil Appeal No. N-01-7-1994 in the case of *Inspector General of Police & Ors. v. Teh Guan Teik (Sgt. 7847)* wherein the respondent had successfully obtained a declaration in the High Court that his dismissal as a police officer by the first appellant was without reasonable cause or excuse the Court of Appeal in giving its decision on a preliminary issue raised as to whether the respondent had adopted the right procedure when seeking a declaratory judgment instead of an order of *certiorari, inter alia* had this to say:

> We consider that as the inferior tribunal had made a decision and as the party aggrieved by that decision, the respondent should have applied for an order of *certiorari* to quash that decision failing which the decision of inferior tribunal still stands.

Applying the principles laid down by the Court of Appeal in the above stated case I am of the view likewise in the present case since the magistrate had made the order to detain the applicant in a judicial proceeding the applicant being the aggrieved person should have applied for an order of *certiorari* to quash that order failing which the order of the magistrate still stands.

In the case of *Re Makhanlall & Co. Ltd.* [1969] 1 MLJ 36 the question to be decided by the Singapore High Court was whether the remedy of an order of *certiorari* was applicable when the magistrate had made an order under the Local Government Integration Ordinance 1961. It was held that the magistrate in making the order had acted in excess of his jurisdiction and as a result the order made by the magistrate had to be quashed by way of an order of *certiorari.*

On the order of *certiorari* to be issued in any given circumstances it is worth noting the relevant passage on the subject of *certiorari* in the book *Administrative Law* (Seventh Edition) by Wade & Forsyth which *inter alia* states as follows:

> *Certiorari* is used to bring into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed – that is to say it is declared completely invalid, so that no one need respect it.

I would also venture to state here that the present application made by the applicant for a writ of *habeas corpus* can be easily distinguished from the application for judicial review by way of a writ of *habeas corpus* made by a detainee under the preventive laws such as the Internal Security Act 1960 and Public Order and Prevention of Crime Ordinance 1969. Under such preventive laws a detention order is issued by the executive body in the name of the Minister of Home Affairs or his Deputy exercising his executive function and powers. When an application for judicial review is made and it results in a writ of *habeas corpus* being issued the effect on the executive order made is that it is the detention order itself is set aside or quashed. Whereas in the present application the detention order issued by the magistrate must be treated as an order made in a judicial proceeding which shall stand until it is quashed by another order of a Superior Court of competent jurisdiction. This can be done only by way of an order of *certiorari* and not by way of a writ of *habeas corpus.*

As to the point raised by the learned counsel for the applicant that the Superior Courts including the Supreme Court/Federal Court have all along in the past in dealing with the order made by the magistrate under s. 6 of the Act have not questioned the propriety of any applicant applying for an order of a writ of *habeas corpus,* I find as a fact that this preliminary issue had never been dealt with before by the Superior Courts and it is therefore not inappropriate for this court to deal with it now and come to a decision.

Based on the foregoing analysis it is my finding that the right procedure to be adopted by the applicant is to apply for an order of *certiorari* to quash the order of the magistrate rather than file a writ of *habeas corpus.* For the reasons that I have allowed the preliminary objection raised by the learned Federal counsel for the respondents I therefore dismissed all the applications before me without hearing the merits of the respective applications.

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